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No. 10-572

Supreme Court, U.S.
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In the

Supreme Court of the United States

THE REPUBLIC OF ARGENTINA,
BANCO DE LA NACIÓN ARGENTINA,

Petitioners,

v.

EM LTD., NML CAPITAL, LTD.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. THERE IS A CLEAR CONFLICT IN THE COURTS OF APPEALS AS TO WHETHER THE FSIA REQUIRES APPLICATION OF FEDERAL COMMON LAW OR FORUM STATE CHOICE OF LAW RULES, AND THAT CONFLICT IS DIRECTLY RELEVANT TO THE OUTCOME IN THIS CASE.	2
II. RESPONDENTS' POSITED VEHICLE PROBLEMS ARE ILLUSORY.	8
CONCLUSION	12

TABLE OF AUTHORITIES

Cases:	*Page(s)*
Barkanic v. Gen. Admin. of Civil Aviation of the People's Republic of China, 923 F.2d 957 (2d Cir. 1991)	3
City of Springfield v. Kibbe, 480 U.S. 257 (1987)	6-7
Dumont v. Saskatchewan Gov't Ins. (SGI), 258 F.3d 880 (8th Cir. 2001)	2
Estee Lauder Cos. Inc. v. Batra, 430 F. Supp. 2d 158 (S.D.N.Y. 2006)	9
First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611 (1983)	5, 7
Gagan v. Monroe, 269 F.3d 871 (7th Cir. 2001)	11
In re Aircrash Disaster Near Roselawn, Ind. on Oct. 31, 1994, 926 F. Supp. 736 (N.D. Ill. 1996)	2-3
Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374 (1995)	6, 7
Pescatore v. Pan Am. World Airways, Inc., 97 F.3d 1 (2d Cir. 1996)	2-3
Schoenberg v. Exportadora de Sal, S.A. de C.V., 930 F.2d 777 (9th Cir. 1991)	6

Page(s)

Schreiber v. Kellogg,
50 F.3d 264 (3d Cir. 1995) 11

Schultz v. Boy Scouts of Am., Inc.,
480 N.E.2d 679 (N.Y. 1985) 3

Shannon v. Irving Trust Co.,
9 N.E.2d 792 (N.Y. 1937) 3, 9

Taylor v. Freeland & Kronz,
503 U.S. 638 (1992) 7

United States v. Williams,
504 U.S. 36 (1992) 5, 7

Verlinden B.V. v. Cent. Bank of Nigeria,
461 U.S. 480, 497 (1983) 10

Virginia Bankshares, Inc. v. Sandberg,
501 U.S. 1083 (1991) 7

Walker Int'l Holdings, Ltd. v. Republic of Congo,
415 F.3d 413 (5th Cir. 2005) 11

Woodling v. Garrett Corp.,
813 F.2d 543 (2d Cir. 1987) 3, 8-9

Yee v. City of Escondido,
503 U.S. 519 (1992) 6

Page(s)

Rules and Statutes

28 U.S.C. § 1610 10

28 U.S.C. § 1610(a) 9

Fed. R. Civ. P. 64(a) 10

Fed. R. Civ. P. 69(a)(1) 10

Other Authorities

Restatement (Second) of Conflict of Laws § 187(2)(b) 8

Restatement (Second) of Conflict of Laws § 268(1) 3-4

Restatement (Second) of Conflict of Laws § 270(a) 4

14A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3662 (3d ed. 1998) 2

REPLY BRIEF FOR PETITIONERS

Respondents do not dispute the existence of the longstanding circuit split among the Second, Sixth, D.C. and Ninth Circuits on whether, in cases under the Foreign Sovereign Immunities Act ("FSIA"), a federal court should apply federal common law choice of law rules or those of the state in which the court sits. The division in the courts of appeals on this important question of federal law calls for this Court's review. The impact of this circuit split is exemplified by the court of appeals decision here, which applied New York choice of law rules (which incorporate New York's view of public policy) to disregard a trust governed by Argentine law and settled in Argentina, by Argentine parties, in 1999 – *years* before the Republic's historic economic crisis in 2001, and *years* before the respondent hedge funds sued the Republic of Argentina on defaulted debt. The petition thus raises compelling issues concerning the protections to be afforded to foreign states from execution or attachment in U.S. courts and whether those protections, as embodied in the FSIA, should be trumped by local "policy" concerns.

Respondents' assertion that the petitioners did not preserve the choice of law question is wrong. Petitioners argued at all times below that *Argentine* law – not New York law – should control the case and determine the validity of the Argentine BH Trust, which is precisely what *would* have happened if the court of appeals had applied a federal common law analysis as opposed to state choice of law rules. The choice of law question was also

plainly addressed by the court of appeals when it held, relying on prior Second Circuit precedent, that the FSIA requires courts to apply the choice of law provisions of the forum state. Nor are respondents correct in asserting that the question presented is irrelevant to the outcome in this case. The opposite is true: had the court of appeals applied federal common law instead of the forum choice of law rule, it could not have invalidated the Argentine BH Trust for the benefit of the respondent judgment creditors.

I. THERE IS A CLEAR CONFLICT IN THE COURTS OF APPEALS AS TO WHETHER THE FSIA REQUIRES APPLICATION OF FEDERAL COMMON LAW OR FORUM STATE CHOICE OF LAW RULES, AND THAT CONFLICT IS DIRECTLY RELEVANT TO THE OUTCOME IN THIS CASE.

Respondents concede, as they must, that there is a circuit split on the issue of which choice of law rules – federal common law or forum state – apply in FSIA cases. Opp. 18-19; *see also, e.g., Dumont v. Saskatchewan Gov't Ins. (SGI)*, 258 F.3d 880, 886 (8th Cir. 2001) ("In a FSIA case, 'there is no clear understanding as to whether the forum state's choice-of-law rules should apply or whether federal common law should govern.'" (quoting 14A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3662 (3d ed. 1998))); *In re Aircrash Disaster Near Roselawn, Ind. on Oct. 31, 1994*, 926 F. Supp. 736, 739 (N.D. Ill. 1996) ("In FSIA actions,

courts are divided as to whether the forum state's choice of law rules should apply or whether federal common law should govern."); *Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1, 12 (2d Cir. 1996) (same); additional cases at Pet. 13-14.

The New York choice of law rule – which the Second Circuit applies in FSIA cases, *see Barkanic v. Gen. Admin. of Civil Aviation of the People's Republic of China*, 923 F.2d 957, 959 (2d Cir. 1991) -- requires application of the governing law specified in the trust (here, Argentine law) unless application of such law would violate *New York* public policy. *See Shannon v. Irving Trust Co.*, 9 N.E.2d 792, 794 (N.Y. 1937) ("a determination of [a trust's] validity [should be] made according to the law chosen by the settlor unless so to do is contrary to the public policy of *this state*") (emphasis added); *see also Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679, 687 (N.Y. 1985) ("The public policy doctrine is an exception to implementing an otherwise applicable choice of law in which the forum refuses to apply a portion of foreign law because it is contrary or repugnant to *its State's* own public policy.") (emphasis added); *Woodling v. Garrett Corp.*, 813 F.2d 543, 551 (2d Cir. 1987) (explaining that New York's choice of law principles require application of designated choice of law unless doing so would violate "fundamental policies of *New York* law") (emphasis added).

By contrast, federal common law requires application of the law designated in the trust, *see* Restatement (Second) of Conflict of Laws § 268(1)

(stating that a trust instrument is "construed in accordance with the rules of construction of the state designated for this purpose in the instrument"), and when it permits public policy to trump that law, applies the policy of the jurisdiction with the most significant relationship to the trust. *Id.* § 270(a) (providing that designated law must be applied to issue of trust validity unless doing so would violate "a strong public policy of *the state with which, as to the matter at issue, the trust has its most significant relationship*") (emphasis added) (cited at Opp. 13). Whereas New York courts are required to analyze whether application of the designated law in the trust instrument violates *New York* public policy, courts applying federal common law must adhere to the law specified in the trust unless the state with the "most significant relationship" with the trust has a "strong" public policy counseling against application of the designated law. This is a very different analysis than mechanically applying the *forum state's* public policy views, and one with profound implications for foreign sovereigns.

The New York choice of law rule is thus different from the federal common law rule in a key respect, and that difference bears directly on the outcome in this case. When the court of appeals here applied the New York rule, it had to consider *New York* policy, something it would not have done under the federal rule *unless* it had first concluded that *New York* has the "most significant relationship" with the Argentine BH Trust. It could not have so concluded, because there is no serious question that

the BH Trust has its "most significant relationship" with Argentina, as opposed to New York. The trust was settled in Argentina and created under Argentine law to further public works development in Argentina; the trustor, trustee, and beneficiaries of the trust are all Argentine. Had the court of appeals applied federal common law choice of law rules, it would therefore not have been permitted to rely on *New York* state policy to invalidate a purely Argentine trust instrument. *See* Pet. App. 8a (court of appeals holding that, "despite the choice of law provision in the BH Trust agreement purporting to establish a trust pursuant to Argentine law, New York law would not recognize it as such since enforcing the trust agreement would violate 'fundamental policies' of New York law"). It is difficult to imagine a clearer case of a court applying a "parochial state interpretation" in a matter involving foreign sovereign relations. *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983) ("*Bancec*") (citation and internal quotation marks omitted).

Respondents are wrong to argue that petitioners are barred from presenting the choice of law question on petition for certiorari. Opp. 8-9. This Court "precludes a grant of certiorari only when the question presented was not pressed *or* passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (emphasis added) (citation and internal quotation marks omitted). This is not the case here.

First, respondents admit that petitioners have at all times argued that Argentine law, not New York

law, governed the validity of this Argentine trust. Opp. 9. The choice of law issue is "not a new claim, but a new argument to support what has been [petitioners'] consistent claim." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1996); *see also Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992) ("Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below. . . . A litigant seeking review in this Court of a claim properly raised in the lower courts thus generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below."); *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 782-83 (9th Cir. 1991) (ruling on the forum state versus federal common law choice of law question though it had not been explicitly argued in the district court because the "relevant issue is whose law applies, and [appellant] itself raised that. The question of whose rules apply in *deciding* whose law applies is predicate to the ultimate decision," and thus the court "must evaluate whatever steps are necessary to decide [that] issue").

Second, the court of appeals quite clearly "passed upon" the choice of law issue by concluding that, under the FSIA, the forum state's choice of law provisions should apply, and by citing Second Circuit precedent explicitly applying forum state choice of law provisions over federal common law rules in FSIA cases. Pet. App. 7a-8a. Respondents' invocation of *City of Springfield v. Kibbe*, 480 U.S. 257

(1987), for the proposition that the Court will ordinarily decline to decide questions not raised or litigated below, "even if they were passed on by the Court of Appeals," Opp. 8, is inapposite, because in *Kibbe* the relevant question had not been presented in the petition for certiorari and was not raised by either party until the merits briefing before the Court. *Kibbe*, 480 U.S. at 260 ("the petition did not explicitly present the negligence question"); *accord Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) (argument raised for first time in opening merits brief). And in multiple cases since *Kibbe*, the Court has made clear that certiorari is precluded only where the question presented was not pressed *or* passed upon below. *Williams*, 504 U.S. at 41 ("That this rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon, is illustrated by some of our more recent dispositions."); *see also Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991); *Lebron*, 513 U.S. at 379.

The clash of opinions concerning which conflict of laws rules apply in FSIA cases is long overdue for resolution. *See Bancec*, 462 U.S. at 622 n.11 (recognizing that, "[w]hen it enacted the FSIA, Congress expressly acknowledged the importance of developing a uniform body of law concerning the amenability of a foreign sovereign to suit in United States courts."). Respondents' speculation that the circuit split will "self-correct" itself at some unidentified future point via an *en banc* Ninth Circuit ruling overturning decades of precedent, Opp. 18-19,

promises no resolution of the split and only underscores the importance of review by this Court.

II. RESPONDENTS' POSITED VEHICLE PROBLEMS ARE ILLUSORY.

While recognizing the circuit conflict on whether federal common law or state choice of law rules apply in FSIA cases, respondents avoid its resolution by invoking a host of specious "vehicular problems." This attempt fails.

First, this case is an appropriate vehicle for resolving the circuit split because the applicable federal choice of law rules plainly diverge from the New York rules applied below. Respondents try to downplay the difference between the New York state and federal common law approaches by arguing that New York follows the same choice of law rule here as that embodied in Section 187 of the Restatement. *See* Opp. 10-13; Restatement (Second) of Conflict of Laws § 187(2)(b) (stating that designated choice of law applies unless its application "would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state"). This is wrong, as demonstrated by the ruling of the court of appeals, in which the court applied New York law to override the designated choice of law in the BH Trust Agreement and did *not* cite Section 187 of the Restatement. *See* Pet. App. 8a (holding that "New York law requires the court to honor the parties' choice [of law provision] insofar as matters of substance are concerned, '*so long as fundamental policies of New*

York law are not thereby violated'" (emphasis added) (quoting *Woodling*, 813 F.2d at 551)). Although New York courts sometimes cite Section 187 – which applies to validity of *contracts*, not trusts – in contracts cases, *see, e.g.*, *Estee Lauder Cos. Inc. v. Batra*, 430 F. Supp. 2d 158, 170 (S.D.N.Y. 2006) (involving an employment agreement), the New York choice of law rule in the context of *trusts* is that expressed by the New York Court of Appeals in *Shannon* and also applied below: the law specified in the trust instrument should be applied unless to do so would be contrary to the public policy of *New York*. *See Shannon*, 9 N.E.2d at 794.[1]

Second, Federal Rules of Civil Procedure 64 and 69 do not require the application of New York choice of law rules and have no bearing on the circuit split over the appropriate choice of law rules to apply in FSIA cases. Respondents argue that "attachment and execution are governed by the law of the forum state" pursuant to Federal Rules 64 and 69, and that "questions about the scope and

[1] Respondents' argument that this Court's review will have no "practical impact" here because the beneficial interests in the BH Trust were also restrained, Opp. 14-15, is likewise meritless. While the district court separately restrained the beneficial interests in the BH Trust, the analysis of both stands or falls together. Once the BH Trust is properly regarded as an Argentine trust, it follows that, like the BH Trust, the beneficial interests held by Argentine entities cannot be deemed to be in the United States, much less used for commercial activity in the United States by the Republic, as required for attachment and execution under the FSIA. 28 U.S.C. § 1610(a).

application of these remedies," which they say includes choice of law issues, therefore "are answered by state law and not federal law." Opp. 16. This is flat-out wrong, and ignores Congress' determination to give the FSIA the central role in governing all issues of substance relating to enforcement of judgments against foreign sovereigns in the United States. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 497 (1983) ("In [enacting the FSIA], Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts, thereby reducing the potential for a multiplicity of conflicting results among the courts of the 50 States.").

The text of both Federal Rules is dispositive. Rule 64 provides that state law remedies for securing satisfaction of a potential judgment, including attachment, are available in a federal action, except that "*a federal statute governs to the extent it applies.*" Fed. R. Civ. P. 64(a) (emphasis added). Rule 69 provides that the procedures employed in an execution proceeding in federal court "must accord with the procedure of the [forum state]," except that, as with Rule 64, "*a federal statute governs to the extent it applies.*" Fed. R. Civ. P. 69(a)(1) (emphasis added). Like other Federal Rules of Civil Procedure, these Rules govern *procedural* issues, but the FSIA controls all matters of substance relating to attachment or execution of assets of a foreign state. *See* 28 U.S.C. § 1610.

The cases respondents cite for their proposition that the admitted circuit split on choice of law somehow does not apply to "remedial" FSIA cases say nothing of the kind. *Schreiber v. Kellogg*, 50 F.3d 264 (3d Cir. 1995), and *Gagan v. Monroe*, 269 F.3d 871 (7th Cir. 2001), involved straightforward enforcement procedures in which no federal statutes were implicated, much less the FSIA; there was no need to choose among competing choice of law principles, unlike in this case. The FSIA case of *Walker International Holdings, Ltd. v. Republic of Congo*, 415 F.3d 413 (5th Cir. 2005), likewise presented no competing choice of law issue. The Fifth Circuit simply held that because "the FSIA does not supply law conflicting with Texas law on the issue of attorneys' fees," it would apply Texas law to that issue, *id.* at 416, just as federal courts often apply state law *as* federal law to fill in lacunae in the latter. It is exactly the question of whether this should be done for choice of law issues in FSIA cases, or whether federal common law principles should be applied to that issue, that this petition presents.

CONCLUSION

For the reasons set forth above, a writ of certiorari should be granted.

Respectfully submitted,

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